IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. FRANK CHESTER EARL, Appellant.	No. 38689-5-II UNPUBLISHED OPINION

Penoyar, A.C.J. — Frank Earl seeks to appeal from the portion of his judgment and sentence finding that he is a "three strikes" persistent offender. Because he did not challenge that finding in his prior appeal, and because the trial court did not revisit that issue on remand, we dismiss Earl's appeal.[1]

facts

In 2005, a jury found Earl guilty of two counts of first degree rape of a child, one count of attempted first degree rape of a child, one count of second degree child molestation and one count of second degree rape of a child. On March 17, 2006, the trial court sentenced Earl for those convictions. On January 23, 2008, this court affirmed his convictions but remanded with instructions to "vacate the community custody portion of his sentence for second degree child rape, vacate his sentence for attempted first degree child rape, and remand for resentencing on the attempted first degree child rape conviction." *State v. Earl*, 142 Wn. App. 768, 770, 177 P.3d 132 (2008). On November 14, 2008, the trial court complied with this court's opinion by deleting the community custody component for the second degree child rape sentence and by reducing the

[1] A commissioner of this court initially considered Earl's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

sentence for the attempted first degree child rape conviction from 318 months to 238.5 months. The trial court did not address or change any other elements of Earl's sentence.

analysis

Earl now seeks to appeal from the portion of his 2008 judgment and sentence that found him to be a persistent offender under both the "three strikes" provisions of former RCW 9.94A.030(32)(a) [2002 ch. 175, § 5] and the "two strikes" provisions of former RCW 9.94A.030(32)(b) [2002 ch. 175, § 5]. He contends that he had only one prior conviction that qualified as a "strike," and so while he does not deny that he is a persistent offender under the "two strikes" provision, he denies that he is a persistent offender under the "three strikes" provision.

However, Earl's 2006 judgment and sentence contained the same finding and he did not challenge it in his prior appeal. Nor did the trial court address the finding during the remand from this court. "[A] case has no remaining appealable issues where an appellate court issues a mandate reversing one or more counts and affirming the remaining count, and where the trial court exercises no discretion on remand as to the remaining final counts." *State v. Kilgore*, 167 Wn.2d 28, 37, 216 P.3d 393 (2009) (citing *State v. Barberio*, 121 Wn.2d 48, 51, 846 P.2d 519 (1993)). "Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question." *Kilgore*, 167 Wn.2d at 37 (quoting *Barberio*, 121 Wn.2d at 50). Because the trial court did not address the persistent offender finding during the remand from this court, the finding is not an appealable question, and we must dismiss Earl's appeal. His means of addressing the finding is through a personal restraint petition.

We dismiss Earl's appeal.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record. RCW 2.06.040.

Penoyar, A.C.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.